

**United States District Court**

For the Northern District of California

11 PIOTR J. GARDIAS,

No. C04-04086 HRL

12 Plaintiff,

Consolidated With: C04-04768 HRL  
C05-01242 HRL  
C05-01833 HRL  
C06-04695 HRL

13 v.

15 SAN JOSE STATE UNIVERSITY,

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

16 Defendant.

[Re: Docket No. 323]

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18  
19 This is a consolidated action, filed pursuant to Title VII of the Civil Rights Act of 1964,  
20 42 U.S.C. § 2000e, et seq. ("Title VII"), for alleged employment discrimination. Defendant  
21 California State University<sup>1</sup> moves for summary judgment as to all claims. Plaintiff Piotr J.  
22 Gardias, proceeding *pro se*, opposes the motion. Upon consideration of the moving and  
23 responding papers, as well as the arguments presented at the motion hearing, this court  
24 GRANTS the motion.<sup>2</sup>

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27 \_\_\_\_\_  
28 <sup>1</sup> Defendant says that it was erroneously sued as "San Jose State University."

<sup>2</sup> Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties have  
expressly consented that all proceedings in this matter may be heard and finally adjudicated  
by the undersigned.

**I. BACKGROUND<sup>3</sup>**

Since 1989, Gardias has been employed by the California State University system at the San Jose State University (“SJSU” or “University”) campus. He claims that defendant failed to promote him to certain positions because of his age and national origin, and in retaliation for his discrimination complaints. He also says that he has been harassed and subject to a hostile work environment. Except as otherwise indicated, there is no material dispute as to the following facts:

Gardias was born in Poland in 1933 and was raised there. He graduated in 1954 from Gdansk Technical University with a degree in mechanical engineering (heat turbines). He later earned a master’s degree in mechanical engineering (mechanics) from the University of Warsaw in 1959 and another in mechanical engineering (nuclear power) from the Technical University of Warsaw in 1962. After immigrating to the United States, plaintiff also obtained a master’s degree in engineering from SJSU in 1992. Gardias’ resume indicates that, before coming to the United States, he supervised projects pertaining to the construction of pipelines, power plants and like facilities in other countries, including Turkey and Indonesia, at various periods between 1973 and 1987. (Plaintiff’s Index I). Although he reportedly had a license at some point when he worked in Poland, Gardias is not a licensed California Professional Engineer.

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<sup>3</sup> The court pauses to identify certain matters that are not at issue in this litigation. First, there is no claim as to Chris Nordby and a position at the University’s Cogeneration Turbine Plant. This court previously determined that any claim as to that position has not been properly raised in this case. (See Docket No. 287, September 10, 2007 Order). Second, although Gardias continues to assert certain health-related issues, he previously withdrew, in open court, all claims based upon his health. Since then, he has flip-flopped on that position depending on what stance he believed would be more advantageous to him at a given moment. The fact remains, however, that he vigorously opposed defendant’s efforts to obtain discovery of his medical records by disclaiming any disability and any intent to inject issues as to his health in this litigation. Indeed, defendant consequently was barred from taking that discovery because of the position taken by plaintiff. When asked by the court for the basis of his claims against defendant, plaintiff confirmed that he claims only that he has been unfairly treated on the basis of his age and national origin. (See Docket No. 277, August 22, 2007 Order). In any event, Gardias subsequently filed a separate lawsuit – his sixth, but by no means his last complaint, filed in this court – indicating that he intends to claim discrimination or harassment based upon an alleged disability. That action, Case No. C07-06242, has not been consolidated with the instant suit.

SJSU hired Gardias in 1989 to work as an Operating Engineer at the Cogeneration and Central Plants. In about 1993, he was reassigned to work in the Facilities Development and Operations (“FDO”) department as a Maintenance Mechanic/Building Service Engineer<sup>4</sup> – the position he has held for most of his employment at the University, and the one he continues to hold today. This is a skilled trade position involving the operation, maintenance, inspection and repair of the ventilation, heating and water systems on campus. Gardias believes that his current position is far below his education and experience. He has therefore sought other employment opportunities at SJSU. And, thus, events forming the basis for the instant consolidated lawsuit began to unfold.

#### A. Building Official Assistant Position<sup>5</sup>

In June 2001, plaintiff was given an opportunity to work in the department of Planning, Design and Construction (“PDC department”) as a Building Official Assistant, performing blueprint review and construction inspection. (See Delgado Decl., Ex. A). In his view, this was a step up on the University’s employment ladder.

Nevertheless, according to plaintiff’s account of events, his stint at the PDC department was by no means smooth. He says he was criticized for yelling at an architect – Gardias admits he yelled, but claims that, at the time, he did not realize he was raising his voice. He says that he requested certain work tools and permission to attend a symposium, but claims that Allan Freeman (not clearly identified by plaintiff, but apparently an administrator within the PDC department) failed to secure the requisite funds. Another time, Gardias was offended when Art Heinrich (also not clearly identified by plaintiff, but apparently a co-worker within the PDC department) allegedly removed Gardias’ notes from a blueprint without telling him first. In one June 2002 incident, Gardias says he went to speak with Heinrich about work duties and organization in the PDC department. Heinrich allegedly “yelled at me immediately ‘get out of

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<sup>4</sup> This position previously was titled “Maintenance Mechanic,” but was later renamed “Building Service Engineer.” For present purposes, and for simplicity, this court will refer to the position by its current title.

<sup>5</sup> For background purposes, the facts pertaining to this position are set out here. As discussed more fully below, however, Gardias’ claims as to the Building Official Assistant position are time-barred. (See discussion infra, Section III.C.1.).

1 my office.”” (Plaintiff’s Index VI at 8). Gardias reportedly was not permitted to post his  
2 credentials on the PDC internet homepage. He opines that Freeman did not like the idea  
3 because Freeman “has [a] PhD” and that the request therefore was “not good for him.” (Rivera  
4 Decl., Ex. A at AGO-1617-19). Gardias further asserts that “[t]he hiding of my knowledge  
5 from clients creates their mistrust.” (*Id.*). There is, however, no evidence indicating that other  
6 non-supervisor PDC employees were allowed to post their credentials on the internet homepage.  
7 Gardias also claims to have been rejected for other (unidentified) positions he applied for in the  
8 PDC department.

9       In September 2002, the Building Official Assistant position was terminated, and Gardias  
10 was returned to his prior job classification as a Building Service Engineer. According to  
11 defendant, plaintiff’s assignment to the Building Official Assistant position was only temporary,  
12 and the termination of the position was not a reflection of his performance. Rather, the position  
13 had to be terminated for budgetary reasons. (See Rivera Decl., Ex. A at AGO 307). Plaintiff  
14 disagrees. He feels that if there had been legitimate budgetary concerns, the PDC department  
15 would not have gone out and purchased an electric cart at around this same time. He claims that  
16 he was never told that the Building Official Assistant position was temporary until September  
17 2002, when he learned that the position was being terminated. He further contends that his  
18 supervisors in the PDC department had earlier told him that they planned to have him stay in the  
19 position permanently. (Plaintiff’s Index IV). He believes that his return to his prior Building  
20 Service Engineer position was, in effect, a demotion. But he does not claim that he received  
21 less money or suffered a reduction in any benefits. Nor is there anything to suggest that his  
22 personnel record was smeared in any way. Rather, Gardias testified in deposition that he did  
23 not like being returned to a job with the title “Maintenance Mechanic” (at the time, the position  
24 had not yet been renamed “Building Service Engineer”). Nonetheless, he believed that Betty  
25 Luna, Director of Facility Operations, was being truthful when she said that the return to his  
26 prior position was, in fact, not a demotion. (Cain-Simon Decl., Ex. E (Gardias Depo. at 204:13-  
27 205:17)).

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1       **B.     Construction Coordinator<sup>6</sup>**

2           In 2002, Gardias applied for the position of Construction Coordinator. The Construction  
3 Coordinator is responsible for the day-to-day management of the University's construction  
4 projects. Essential duties include (a) inspecting and monitoring construction sites (as well as all  
5 pre-construction activities); (b) providing technical guidance and support to plant maintenance  
6 staff and to the health and safety office; (c) developing project specifications and writing  
7 construction specifications; (d) ensuring compliance with building, fire and safety codes; (e)  
8 developing budgets; and (f) acting as the University's liaison with architectural and engineering  
9 consultants. (Rivera Decl., Ex. A at AGO 0972-0973). Additionally, the Construction  
10 Coordinator is expected to have thorough knowledge of construction methods, practices and  
11 procedures," as well as modern management and administrative techniques relating to fiscal  
12 controls, personnel, work planning, scheduling and coordination. (*Id.*). Preferably, the  
13 candidate would have a "[m]aster's degree in [a] related field and/or [a] license in architecture  
14 and/or [a] certification in building inspection." (*Id.*).

15           After an initial screening, Gardias was interviewed for the position. According to  
16 defendant, all three members of the interview panel noted that he lacked the necessary  
17 communication skills. The position was given instead to James Fernane. According to  
18 Fernane's resume, he had earned a college degree in architecture/city planning and had then  
19 worked at various places, including several years at the University of California at Berkeley as  
20 an Associate Project Manager on projects involving university housing, dining and office  
21 facilities. (Plaintiff's Index IV). Fernane reportedly left SJSU shortly thereafter, and plaintiff  
22 contends that it was because Fernane did not possess all the skills he claimed to have. There is,  
23 however, no indication in the record that when Fernane was hired, defendant had any reason to  
24 believe that he did not have the skills and experience he claimed. Gardias maintains that he was  
25 the more qualified candidate and that he should not have been reassigned from Building Official  
26 Assistant to his prior Building Service Engineer position while there was a vacancy for  
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28           <sup>6</sup> As discussed more fully below, plaintiff's claims as to this position are also time-barred. (See discussion, *infra*, Section III.C.1.).

1 Construction Coordinator. He nonetheless testified in deposition that none of the members of  
 2 the interview committee discriminated against him. (Cain-Simon Decl., Ex. E (Gardias Depo.  
 3 356:9-358:25)).<sup>7</sup>

4 **C. Director of Planning, Design & Construction**

5 Gardias next applied, in July 2003, for the position of Director, Planning, Design &  
 6 Construction (“PDC Director”), an executive-level position. The PDC Director administers  
 7 policies and procedures for planning and developing the University’s campus. According to the  
 8 job description, the PDC Director, among other things:

- 9     • “Provides leadership for all phases of the capital planning and project delivery  
  10   process, (i.e., scope, feasibility, programming, schematic design, design  
  11   development, construction documents, construction, move in and close out);”
- 12     • “Develops and implements the University’s five-year capital outlay program, the  
  13   physical master plan, and the annual minor capital outlay”;
- 14     • “Ensures that the budget integrity of the Service Group/Division/University is  
  15   not compromised”
- 16     • “Serves as an active member of various campus facilities-related advisory  
  17   boards”;
- 18     • “Ensures that campus physical development, including on- and off-campus  
  19   properties, satisfy the requirements of the campus Long Range Development  
  20   Plan and the Environmental Impact Report (EIR); and
- 21     • “As needed, directs the preliminary environmental assessments for capital  
  22   projects on campus ensuring compliance with the California Environmental  
  23   Quality Act (CEQA) and provides technical support and review for off-campus  
  24   projects.”

25 (Rivera Decl., Ex. A at AGO170-71). Additionally, the PDC Director must be an excellent  
 26 communicator who is able to identify and promote public/public and public/private

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27         7         Gardias later reversed this position and “corrected” his testimony to indicate,  
 28 generally, that the members of the interview committee did discriminate against him. (See  
     Plaintiff’s “May 16, 2007 Deposition Transcript Correction And Changes, Case No. C04-  
     04086, Docket No. 247 at 34). Indeed, many of his “corrections” constitute complete  
     reversals of his prior testimony. “While the language of FRCP 30(e) permits corrections ‘in  
     form or substance,’ this permission does not properly include changes offered solely to  
     create a material factual dispute in a tactical attempt to evade an unfavorable summary  
     judgment.” Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217,  
     1225 (9th Cir. 2005). Such “corrections” by Gardias do not create a genuine issue of  
     material fact.

1 development opportunities; to manage complex projects through staff and outside consultants;  
2 and to work effectively across all levels of the university, demonstrating collaborative decision-  
3 making skills. (Id.).

4 Gardias was not interviewed for this position. Defendant points out that, in deposition,  
5 plaintiff testified that he did not know what the term “regulatory compliance” meant in the  
6 context of developing a large capital project. (Cain-Simon Decl., Ex. E (Gardias Depo. at  
7 93:25-94:20)). When asked whether he knew what the acronym “CEQA” stands for, Gardias  
8 answered: “That – maybe I know, but just that there are many – many – many –.” (Id. (Gardias  
9 Depo. at 117:10-17)).<sup>8</sup>

10 The successful candidate, William Shum, is an Asian-American with a bachelor’s  
11 degree and a master’s degree in architecture. He completed 24 units of an MBA program and  
12 worked for several years in the private sector as a project designer and project manager. His  
13 work experience included a \$14 million project for the Convocation & Recreational Complex  
14 at Duquesne University in Pennsylvania, as well as the implementation of a \$20 million  
15 program for the state of West Virginia, which included the construction of two new high  
16 schools and the renovation of nine middle and elementary schools. Just prior to his  
17 employment at SJSU, Shum worked for seventeen years at California State University’s San  
18 Bernardino campus as the Director of Planning, Design and Construction – a job whose duties  
19 reportedly were very similar to the PDC Director position at SJSU. (Plaintiff’s Index II).

20 **D. Chief Engineer**

21 Gardias next applied for the position of Chief Engineer in January 2004. The Chief  
22 Engineer is responsible for operating, maintaining and managing the University’s energy  
23 infrastructure and 24-hour operations, including campus heating, ventilation and air  
24 conditioning systems. As part of the essential duties of the job, the Chief Engineer has “24/7  
25 operational responsibility” and is expected to (a) make recommendations for utility

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27       <sup>8</sup> In his subsequent “corrections” to his deposition testimony, plaintiff changed  
28 this answer to: “Yes, I do know what California Environmental Quality Act.” (Docket No.  
247 at 10). For reasons stated above, this court finds that this “correction” does not create a  
genuine issue of material fact. (See Footnote 7, supra).

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1 improvements and expansion; (b) establish contingency plans in the event of a catastrophic  
 2 failure; (c) develop procedures for obtaining environmental licenses, permits and tests required  
 3 under state and federal law; (d) oversee the budget for utility operations; (e) work directly with  
 4 state and federal agencies and university departments concerned with water quality, wastewater  
 5 treatment, electrical power, and other utility matters; and (f) correspond with appropriate  
 6 regulatory and utility bodies. (Rivera Decl., Ex. A at AGO0298-99). Additionally, the Chief  
 7 Engineer must interpret technical procedures and regulations; write reports, business  
 8 correspondence and business manuals; and effectively present information and respond to  
 9 questions from groups of managers, customers, and the general public. The Chief Engineer is  
 10 also expected to know local permitting requirements and applicable EPA regulations. The job  
 11 description required ten years minimum experience in utilities operations and management,  
 12 with at least five years of progressive experience operating a cogeneration plant, boilers, and  
 13 chillers. Budget and management experience was essential. A four-year college degree in  
 14 electrical or mechanical engineering was preferred, but not required. (*Id.*).

15       Gardias was not interviewed for this position. Here, defendant points out that, in  
 16 deposition, plaintiff testified that when he got the job description, he had to look up the  
 17 acronym “EPA” and then wrote down its meaning – “Environmental Protection Agency” – on  
 18 his copy of the document. (See Cain-Simon Decl., Ex. E (Gardias Depo. at 161:18-162:2));  
 19 Rivera Decl., Ex. A at AGO 0299).<sup>9</sup>

20       The job went to Scott Anderson. Anderson began working at SJSU in 1979 as a  
 21 Building Service Engineer and over the next twenty-four years worked his way up to the  
 22 position of Supervising Building Service Engineer, overseeing and coordinating skilled and  
 23 semi-skilled crews as to the installation, maintenance and repair of campus utility systems.  
 24 (Plaintiff’s Index III). Prior to that, Anderson had finished one year of college and served four  
 25

26       <sup>9</sup> In his subsequent corrections to his testimony, Gardias changed his answer to:  
 27 “When I notice term ‘EPA’ on job description I was not sure that this acronym was the same  
 28 which I used in PDC. I had to review the rules to be sure. . . No, I knew what the acronym  
 ‘EPA’ means. But there are many acronyms and I always check.” (Docket No. 247 at 16).  
 For reasons stated above, this court finds that this “correction” does not create a genuine  
 issue of material fact. (See Footnote 7, *supra*).

1 in the Navy, where he completed 6 months of technical training at the Navy's Boiler Technician  
2 "A" School and Console Operations School and worked as a boiler technician (coordinating  
3 boiler plant maintenance and monitoring console operations). He then worked for several  
4 months at the University of San Diego in the Physical Plant and Maintenance Operations  
5 (performing general maintenance and repair on heating, ventilation, air conditioning and  
6 electrical systems) just prior to his employment at SJSU.

7 **E. Director of Energy & Utility Systems**

8 In May 2004, Gardias applied for the Director of Energy & Utility Systems position.  
9 The Director of Energy & Utility Systems directs the operation of the University's energy and  
10 utility services for all campus buildings. The Director is expected to be available to respond to  
11 operational and emergency calls 24 hours/day and is also responsible for (a) overseeing the  
12 budget for all energy and utility operations (in the \$6 million dollar range); (b) developing plans  
13 and specifications for utilities systems (including upgrades and expansion); (c) preparing capital  
14 improvement projects and budgets; (d) seeking funding for energy conservation projects and  
15 prepare proposals for submission to grant agencies; (e) representing SJSU at related energy and  
16 utility agency meetings and negotiations; (f) serving as the University's liaison with electric,  
17 gas and water utility companies, including regulatory agencies; (g) reviewing and keeping  
18 current with federal, state and city laws to ensure that the University is in compliance; and (h)  
19 preparing financial status reports. (Rivera Decl., Ex. A at AGO-0603-605; Plaintiff's Index I).  
20 Additionally, the University's job description stated that the successful applicant must be able  
21 to interpret technical procedures and regulations; write reports, business correspondence and  
22 procedure manuals; and effectively present information and respond to questions from groups of  
23 managers, customers, and the general public. (*Id.*).

24 Gardias was not interviewed, and the position went to Adam Bayer. Bayer has a  
25 bachelor's degree in marine engineering, as well as a master's degree in engineering (with an  
26 emphasis on engineering management). He is a licensed California Professional Engineer  
27 (mechanical and electrical engineering). Bayer previously worked at Watters Marine Co. for  
28 nine months as a ship superintendent (providing engineering supervision and management). He

1 then worked for nine years as a Chief Stationary Engineer at the University of California, Santa  
2 Cruz (UCSC), where he supervised 12 employees and had responsibility for, among other  
3 things, cogeneration facilities, the fire/security system, and 24/7 operations and maintenance.  
4 He then stayed on for another six years at UCSC as a Senior Engineer in physical planning and  
5 construction (working on capital/infrastructure programs and projects) just prior to his  
6 employment at SJSU. (Rivera Decl., Ex. A at AGO0622-0627).

7 **F. Associate Director of Energy & Utilities/Campus Engineer**

8 Finally, in September 2005, plaintiff applied for the position of Associate Director of  
9 Energy & Utilities. After the position was posted, but before interviews were conducted, the  
10 University withdrew the job announcement and re-issued it as “Campus Engineer.” Defendant  
11 says that the job announcement was modified because University management wanted to  
12 provide for a higher level of engineering skill and to add that a licensed Professional Engineer  
13 was “highly desirable.” (Rivera Decl., Ex. A at AGO 1723).

14 The Campus Engineer works under the general direction of the Director of Energy &  
15 Utilities and is responsible for managing personnel in the operation and maintenance of the  
16 University’s energy and utility systems. Essential duties of the job include (a) conducting daily  
17 job site supervision of staff; (b) monitoring and approving the activities of technical personnel  
18 and services; (c) interviewing, hiring, training and supervising employees; and (d) assisting the  
19 Director of Energy & Utilities in implementing the technical trades apprenticeship program.  
20 (Rivera Decl., Ex. A at AGO 0810-0812). According to the University’s job posting, the  
21 Campus Engineer must be able to interpret technical procedures and regulations; write reports,  
22 business correspondence, and procedure manuals; and effectively present information and  
23 respond to questions from groups of managers and technical trade staff, customers, and the  
24 general public. (*Id.*).

25 Gardias was among the applicants interviewed for the position. Each of the interviewers  
26 noted that he either did not know or did not use certain terminology, such as “VAV” (for  
27 “variable air volume”). (Rivera Decl., Ex. A at AGO 0863-886). In deposition, plaintiff  
28 testified that he knows what “VAV” is, but does not use that acronym in his work. (Cain Simon

1 Decl., Ex. E (Gardias Depo. at 298:23-299:25)).<sup>10</sup> Gardias also acknowledges that he does not  
 2 have a California professional engineering license, but asserts that he does not need one and that  
 3 he had a Polish license when he worked in Poland decades ago. (Cain-Simon Decl., Ex. E  
 4 (Gardias Depo. at 319:20-320:8)).

5 The position was given to Simon Lee, an Asian-American male who has a bachelor's  
 6 degree and a master's degree in electrical engineering. Lee is a licensed California Professional  
 7 Engineer, with special accreditation in energy and environmental design – accreditation that  
 8 Gardias admitted he himself lacked (see Cain-Simon Decl., Ex. E (Gardias Depo. at 320:19-  
 9 322:3)). Just prior to his employment at SJSU, Lee worked on renovation, seismic retrofitting  
 10 and other construction projects for the University of California (at the Berkeley, Riverside, San  
 11 Francisco – Mission Bay, San Francisco – Parnassus, and Los Angeles campuses), as well as for  
 12 other entities, including the Crocker Art Museum, Chiron and Genentech. (Rivera Decl.,  
 13 AGO895-897).

14 **G. Central Plant Training and Energy Management Systems Training**

15 Gardias also claims that he was denied Central Plant training and Energy Management  
 16 Systems training because of his age and national origin and in retaliation for his previous  
 17 discrimination complaints against the University.

18 **1. Central Plant Training**

19 There is no indication that the Central Plant training was needed for Gardias' job. Nor  
 20 is it claimed that the absence of the training held him back from getting any of the jobs he had  
 21 sought. Rather, Gardias wanted to have Central Plant training simply for his own edification.  
 22 (Plaintiff's Index VI; Cain-Simon Decl., Ex. E (Gardias Depo. at 182:22-183:9, 186:6-11)).  
 23 Scott Anderson and Dan Cox (two supervisors from Gardias' department) and Mike Nausin (an  
 24 employee who had worked for IPT, the contractor that previously operated the plant) were  
 25 slated to receive Central Plant training. (See Cain-Simon Decl., Ex. E (Gardias Depo. at

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 27       <sup>10</sup> In subsequent "corrections" to his testimony, Gardias changed his answer to  
 28 indicate that he sometimes uses the term "VAV" in his work. (Docket No. 247 at 28). For  
 reasons stated above, this court finds that this "correction" does not create a genuine issue of  
 material fact. (See Footnote 7, *supra*).

1 180:14-181:16)). Although Gardias was not a supervisor and had no desire to work in the  
 2 Central Plant, he nonetheless felt that he should also have been given the same training in view  
 3 of “my many years experience in cogeneration plants and power plants.” (Plaintiff’s Index VI).

4 In February 2004, Gardias reportedly was given “informal” permission to go to the plant  
 5 as a volunteer for two hours each day, along with the other trainees. (Plaintiff’s Index VI).  
 6 Gardias says that when he arrived at the plant, he was treated in a “rude manner” – i.e., no one  
 7 seemed particularly happy to see him; Anderson allegedly asked Gardias (in a brusque manner)  
 8 what he was doing there; and, when Gardias asked questions, manager Chris Nordby allegedly  
 9 responded, “No, I am busy, you will disturb my work.” (*Id.*).

10 In March 2004, Gardias asked Tony Valenzuela (Associate Vice President, FDO  
 11 department) for permission to go to the Central Plant over the weekend to review equipment  
 12 manuals. Valenzuela said that such permission could not be given because of risk management  
 13 issues presented by having an “observer” in the plant and because plaintiff’s union contract and  
 14 the Fair Labor Standards Act limited the University’s ability to allow non-exempt employees to  
 15 be in and around a work station without pay. (Plaintiff’s Index VI). Defendant maintains that  
 16 there was no legitimate business reason for Gardias to be trained at the Central Plant because he  
 17 was not a supervisor and did not want to be assigned to work there. (Cain-Simon Decl., Ex. E  
 18 (Gardias Depo. at 182:22-183:9); Valenzuela Decl., ¶ 3; Rivera Decl., Ex. A at AGO-0443).<sup>11</sup>

## 19       **2. Energy Management System Training**

20       In Gardias’ June 2003 performance review, he was encouraged to learn more about the  
 21 functions of the Energy Management System (“EMS”). (Plaintiff’s Index: “Valenzuela’s  
 22 Perjury.”). Sometime later, Gardias learned that a co-worker in his department received EMS  
 23 training. He apparently found this unfair because Gardias believes that his skills and experience

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 25       <sup>11</sup>      Gardias later “corrected” his deposition testimony to say that he did not recall  
 26 whether he said he did not want to work at the Central Plant, but confirms that he had no  
 27 intent, in any event, of working again as an Operating Engineer there. (Docket No. 247 at  
 28 18). He also corrected his deposition testimony to say that he did not wish to speculate as to  
 the reasons he wanted training: “I ask you to direct this question to SJSU. I do not see any  
 reason to participate in speculations.” (*Id.* at 19). For the reasons stated above, the court  
 finds that these corrections do not create a genuine issue of material fact. (See Footnote 7,  
supra).

1 are superior to that of his co-worker, who reportedly never completed his apprenticeship.  
 2 Nevertheless, Gardias later testified in deposition that he did not feel he needed EMS training  
 3 and decided that he would train himself. (Cain-Simon Decl., Ex. E (Gardias Depo. at 173:20-  
 4 174:22)). So, instead of asking to be trained, Gardias simply demanded that Scott Anderson  
 5 give him the password for the entire system. (*Id.*). Anderson said no. Gardias felt that this,  
 6 too, was unfair because he believes that his own education and experience are superior to  
 7 Anderson's. But, according to Anderson, there was no legitimate reason for plaintiff to have  
 8 that password – the requested password controls the HVAC, fans and steam for the University's  
 9 buildings; and, its uncontrolled use, in untrained hands, "could potentially have wreaked  
 10 havoc." (Anderson Decl., ¶ 3).

#### **H. Alleged Harassment and Retaliation**

12 In addition to the failure to promote and alleged denial of training, Gardias claims that  
 13 he has been subjected to various acts of harassment and retaliation (discussed in more detail  
 14 below).

15 These events led plaintiff to file five separate lawsuits in this court, all of which have  
 16 been consolidated into a single action.<sup>12</sup> Defendant moves for summary judgment on the  
 17 ground that plaintiff has failed to present evidence that any of the hiring decisions or other  
 18 alleged conduct was based upon any unlawful motive.

#### **II. LEGAL STANDARD**

20 A motion for summary judgment should be granted if there is no genuine issue of  
 21 material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P.  
 22 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears  
 23 the initial burden of informing the court of the basis for the motion, and identifying portions of  
 24 the pleadings, depositions, answers to interrogatories, admissions, or affidavits which  
 25 demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S.  
 26 317, 323 (1986). In order to meet its burden, "the moving party must either produce evidence

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 28 <sup>12</sup> After his first five lawsuits were consolidated, plaintiff filed two more employment discrimination lawsuits against defendant in this court. Those cases (Case Nos. C07-06242 and C08-05498) have not been consolidated with the instant action.

**United States District Court**

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1 negating an essential element of the nonmoving party's claim or defense or show that the  
2 nonmoving party does not have enough evidence of an essential element to carry its ultimate  
3 burden of persuasion at trial." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.,  
4 210 F.3d 1099, 1102 (9th Cir. 2000).

5 If the moving party meets its initial burden, the burden shifts to the non-moving party to  
6 produce evidence supporting its claims or defenses. See FED. R. CIV. P. 56(e)(2); Nissan Fire &  
7 Marine Ins. Co., Ltd., 210 F.3d at 1102. The non-moving party may not rest upon mere  
8 allegations or denials of the adverse party's evidence, but instead must produce admissible  
9 evidence that shows there is a genuine issue of material fact for trial. See id. A genuine issue  
10 of fact is one that could reasonably be resolved in favor of either party. A dispute is "material"  
11 only if it could affect the outcome of the suit under the governing law. Anderson, 477 U.S. at  
12 248-49.

13 "When the nonmoving party has the burden of proof at trial, the moving party need only  
14 point out 'that there is an absence of evidence to support the nonmoving party's case.'" "  
15 Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Celotex Corp., 477 U.S. at  
16 325). Once the moving party meets this burden, the nonmoving party may not rest upon mere  
17 allegations or denials, but must present evidence sufficient to demonstrate that there is a  
18 genuine issue for trial. Id.

### 19 III. DISCUSSION

#### 20 A. Evidentiary Objections

21 Before turning to a substantive discussion of the issues, the court will first address the  
22 parties' respective evidentiary objections.

23 Plaintiff broadly objects to various statements made in declarations submitted by  
24 defendant and claims that defense counsel and other declarants have "committed fraud" and  
25 "perjury." However, this court finds no basis to conclude that anyone has lied or engaged in  
26 any fraud. Instead, it appears that plaintiff is merely expressing disagreement as to defendant's  
27 assertions and characterization of the events in question. Additionally, Gardias objects to the  
28 Declaration of Maria Rivera on the ground that Rivera testifies only that the documents

1 appended to her declaration are true and correct copies of the documents in SJSU's files, but  
2 does not testify about their contents. Rivera's declaration apparently was submitted solely to  
3 authenticate the University's records. It is perfectly permissible. Plaintiff's evidentiary  
4 objections are overruled.

5 In support of his opposition to the instant motion, Gardias submitted some 600 pages of  
6 documents and exhibits, which he compiled into about eight separate indices. Defendant  
7 objects to these documents on one or more of the grounds that they are not authenticated, are  
8 hearsay, or are merely self-serving documents Gardias wrote himself, purporting to detail the  
9 events forming the bases for his various grievances. Indeed, much of plaintiff's "evidence"  
10 suffers from these defects. Nevertheless, with the exception of documents pertaining to  
11 plaintiff's withdrawn health-related claims, this court has reviewed and considered all of  
12 plaintiff's papers.

13 **B. Plaintiff's Age Discrimination Claims**

14 Defendant contends that it is entitled to summary judgment as to plaintiff's age  
15 discrimination claims because those claims are barred by the Eleventh Amendment.

16 The Eleventh Amendment provides: "The Judicial power of the United States shall not  
17 be construed to extend to any suit in law or equity, commenced or prosecuted against one of the  
18 United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."  
19 U.S. CONST. amend. XI. It "has been interpreted to shield States from suits by individuals  
20 absent the State's consent." Wells v. Bd. of Trustees of the California State Univ., 393  
21 F.Supp.2d 990, 995 (N.D. Cal. 2005) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54,  
22 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996)). "The same immunity also applies to state agencies."  
23 Hibbs v. Dep't of Human Resources, 273 F.3d 844, 850 (9th Cir. 2001) (citing Fla. Dep't of  
24 State v. Treasure Salvors, Inc., 458 U.S. 670, 684, 102 S. Ct. 3304, 73 L.Ed.2d 1057 (1982)).

25 The Age Discrimination in Employment Act ("ADEA") "is the exclusive remedy for  
26 claims of age discrimination in employment, even those claims with their source in the  
27 Constitution." Ahlmeyer v. Nevada Sys. of Higher Education, 555 F.3d 1051, 1060-61 (9th  
28 Cir., 2009). The United States Supreme Court has held that the ADEA did not abrogate the

1 states' Eleventh Amendment immunity from suit by private individuals. Kimel v. Florida Bd.  
2 of Regents, 528 U.S. 62, 92, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000). "Nothing in Kimel  
3 suggests that the Court intended to remove the statutory jurisdictional basis for age  
4 discrimination suits against a state or its agencies." Katz v. Regents of the Univ. of California,  
5 229 F.3d 831, 834 (9th Cir. 2000). Nonetheless, "on account of Eleventh Amendment  
6 immunity the states can not be compelled to submit to the jurisdiction of the federal courts in  
7 such suits." Id.<sup>13</sup>

8       Defendant is an arm of the state entitled to claim Eleventh Amendment immunity. See  
9       Stanley v. Trustees of the California State University, 433 F.3d 1129, 1133 (9th Cir. 2006)  
10      ("We have previously held that the Trustees [of the California State University] are an arm of  
11      the state that can properly lay claim to sovereign immunity.") (citing Jackson v. Hayakawa, 682  
12      F.2d 1344, 1350-51 (9th Cir. 1982)); see also Wells, 393 F. Supp.2d at 995 (same). On the  
13      record presented, there is no indication that defendant has expressly waived that immunity. See  
14      Aholelei v. Dep't of Public Safety, 488 F.3d 1144, 1148-49 (9th Cir. 2007) (holding that, even  
15      where the state defendants filed a third-party complaint, they did not waive their Eleventh  
16      Amendment immunity defense as to plaintiff's claims where the defense was promptly asserted  
17      in their answer, was never expressly waived, and subsequently was litigated on summary  
18      judgment).

19 Accordingly, defendant's motion for summary judgment as to plaintiff's claims of age  
20 discrimination is granted.

<sup>13</sup> “A state employee alleging age discrimination in employment is not without a forum altogether, because he can file an ADEA suit in state court.” Ahlmeyer, 555 F.3d at 1060 n.9. Defendant advises that plaintiff filed, and subsequently dismissed, several state court lawsuits against the University for alleged discrimination.

1       **C.     Title VII Claims**2       **1.     Time-Barred Claims**

3              Defendant contends that plaintiff's national origin claim alleged in his first lawsuit  
 4 (Case No. C04-04086), as well as all claims alleged in his third lawsuit, (Case No. C05-01833)  
 5 are time-barred.

6              "Before a claimant can file a Title VII civil action, [he] must file a timely charge of  
 7 discrimination with the EEOC." Nelmida v. Shelley Eurocars, Inc., 112 F.3d 380, 383 (9th Cir.  
 8 1997). "If the EEOC dismisses the charge, a claimant has ninety days to file a civil action." Id.  
 9 "This ninety-day period is a statute of limitations." Id. (citing Scholar v. Pacific Bell, 963 F.2d  
 10 264, 266-67 (9th Cir. 1992)). "Therefore, if a claimant fails to file the civil action within the  
 11 ninety-day period, the action is barred." Id.

12              Equitable doctrines are available to save otherwise untimely claims. Equitable estoppel  
 13 "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing  
 14 suit." Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir. 2002) (quoting Santa Maria v. Pac.  
 15 Bell, 202 F.3d 1170, 1176 (9th Cir. 2000)).

16              The doctrine of equitable tolling, on the other hand, "focuses on whether there was  
 17 excusable delay by the plaintiff." Johnson, 314 F.3d at 414. Equitable tolling may be applied  
 18 where there is excusable ignorance of the limitations period and a lack of prejudice to defendant  
 19 or where there is no danger of prejudice to defendant and the interests of justice require relief.  
 20 Forester v. Chertoff, 500 F.3d 920, 930 (9th Cir. 2007). "This doctrine has been consistently  
 21 applied to excuse a claimant's failure to comply with the time limitations where [he] had neither  
 22 actual nor constructive notice of the filing period." Leorna v. U.S. Dep't of State, 105 F.3d 548,  
 23 551 (9th Cir. 1997)). "Equitable tolling is, however, to be applied only sparingly." Nelmida,  
 24 112 F.3d at 384 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112  
 25 L.Ed.2d 435 (1990)). "Courts have been generally unforgiving . . . when a late filing is due to  
 26 claimant's failure 'to exercise due diligence in preserving his legal rights.'" Scholar, 963 F.2d  
 27 at 268 (quoting Irwin, 498 U.S. at 96).

28

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1 Plaintiff's form complaint in Case No. C04-04086 was filed on September 27, 2004.  
2 (See Case No. C04-04086, Complaint, Docket No. 1). It alleged that defendant failed to  
3 promote him to the PDC Director position because of his age and in retaliation for his prior  
4 discrimination complaints. He did not check the line for national origin discrimination. The  
5 allegations apparently were the subject of Gardias' EEOC Charge No. 377-2004-00260.  
6 Gardias says that he received the EEOC's Notice of Right to Sue on or about July 2, 2004.  
7 Thus, his original complaint timely was filed. However, several months later, on November 10,  
8 2004, he filed an amended complaint, in which he checked the line for national origin  
9 discrimination. (Case No. C04-04086, Docket No. 7). It is not clear whether Gardias alleged  
10 national origin discrimination in the underlying EEOC charge. Assuming he did, plaintiff offers  
11 no explanation for his failure to timely allege it in his federal complaint, and this court finds no  
12 basis for tolling.

13 In Case No. C05-01833, plaintiff's form complaint alleged (a) discrimination and  
14 retaliation based on his reassignment from Building Official Assistant to his prior Building  
15 Service Engineer position and the denial of his application for the Construction Coordinator  
16 position and (b) harassment. (See Case No. C05-01833HRL, Complaint, Docket No. 1). The  
17 claims were the subject of Gardias' EEOC Charge No. 377A300337 filed on March 27, 2003.  
18 Gardias says that he received the EEOC's Notice of Right to Sue on or about June 30, 2003.  
19 His federal complaint, however, was not filed until nearly two years later on May 4, 2005. (See  
20 Case No. C05-01833HRL, Complaint, Docket No. 1). The claims are therefore untimely.

21 This court finds no basis for any tolling here either. Gardias acknowledges that his  
22 complaint was belatedly filed, but says that he should be excused because he discovered in  
23 December 2004 that defendant "falsified" the requirements for the Construction Coordinator  
24 position. (See Case No. C05-01833, Complaint, Docket No. 1 at 3). In deposition, plaintiff  
25 testified that he meant that defendant had provided to the EEOC only the front page, but not the  
26 back page, of the job description. (Cain-Simon Decl., Ex. E (Gardias Depo. at 213:2-214:1)).  
27 This is not a ground for tolling – equitable or otherwise. There is no apparent dispute that  
28 plaintiff was given proper and adequate notice at all stages of the grievance process. Moreover,

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1 it is not argued that plaintiff was misled or misinformed by defendant with respect to the  
2 requirements of the Construction Coordinator position or any applicable deadlines; and, there is  
3 no evidence in the record to suggest that the omission of the back page of the job description in  
4 defendant's submission to the EEOC in any way prevented Gardias from timely filing suit.

5 Gardias argues that the subject claims should not be barred because they are related to  
6 his original complaint filed in C04-04086HRL and to another EEOC charge (Charge No. 377-  
7 2004-00612), which resulted in his second federal lawsuit, Case No. C04-04768HRL. (See  
8 Case No. C05-01833, Complaint, Docket No. 1 at 2). Although both of those lawsuits were  
9 filed earlier in time, they were still filed well beyond the 90-day limitations period from the  
10 EEOC charge that forms the basis for the belated complaint filed in C05-01833. In any event,  
11 each of Gardias' complaints (and the underlying EEOC charges) concern different positions that  
12 he says he was unfairly denied. Discrete acts, such as the failure to promote and denial of  
13 training, “are not actionable if time barred, even when they are related to acts alleged in timely  
14 filed charges.” Lyons v. England, 307 F.3d 1092, 1105 (9th Cir. 2002) (quoting Nat'l R.R.  
15 Passenger Corp. v. Morgan, 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002)). Nor  
16 are plaintiff's claims saved by the fact that he repeated them in his fifth complaint filed in Case  
17 No. C06-04695. See Scholar, 963 F.2d at 268 (“[t]here is no reason why a plaintiff should  
18 enjoy a manipulable open-ended time extension which could render the statutory limitation  
19 meaningless.”) (quoting Lewis v. Conners Steel Co., 673 F.2d 1240, 1242 (11th Cir. 1982)).  
20 Accordingly, plaintiff's claims pertaining to the Building Official Assistant position and the  
21 failure to promote him to the Construction Coordinator position are time-barred.

22 Even assuming that all of these claims were timely filed, for the reasons discussed more  
23 fully below, this court concludes that defendant is entitled to summary judgment as to plaintiff's  
24 claims of discrimination. Plaintiff also broadly claims harassment in his time-barred C05-  
25 01833 complaint; and, “a hostile work environment claim . . . will not be barred so long as all  
26 acts which constitute the claim are part of the same unlawful employment practice and at least  
27 one act falls within the time period.” Lyons, 307 F.3d at 1105-06 (quoting Nat'l R.R.  
28 Passenger Corp. v. Morgan, 536 U.S. at 113). As discussed more fully below, however, the

1 court finds that plaintiff's harassment allegations, even if considered as part of the larger  
2 panoply of harassment alleged in all of his lawsuits, are insufficient to create a hostile work  
3 environment.

4 **2. Burdens of Proof**

5 Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on  
6 race, color, religion, sex and national origin. 42 U.S.C. § 2000e-2(a)(1).

7 “[W]hen responding to a summary judgment motion, the plaintiff is presented with a  
8 choice regarding how to establish his or her case.” McGinest v. GTE Serv. Corp., 360 F.3d  
9 1103, 1122 (9th Cir. 2004)). A plaintiff may proceed by following the McDonnell Douglas<sup>14</sup>  
10 framework, or alternatively, may produce direct or circumstantial evidence demonstrating that a  
11 discriminatory reason more likely than not motivated the defendant. Id.

12 Under the McDonnell Douglas burden-shifting framework, a plaintiff must establish a  
13 *prima facie* case of discrimination. See Vasquez v. County of Los Angeles, 349 F.3d 634, 640  
14 (9th Cir. 2003). If the plaintiff successfully establishes a *prima facie* case, then the burden shifts  
15 to the employer to provide a legitimate, nondiscriminatory reason for its allegedly  
16 discriminatory conduct. Id. If the employer does so, then the burden shifts back to the plaintiff  
17 to show that the employer's reason is a pretext for discrimination. Id.

18 Plaintiff bears the ultimate burden of proving discrimination. Thus, whether he relies on  
19 the McDonnell Douglas framework, or whether he relies on direct or circumstantial evidence, a  
20 plaintiff must produce some evidence suggesting that defendant's failure to promote him was  
21 due in whole or in part to discriminatory intent. McGinest, 360 F.3d at 1123.

22 For the reasons explained below, this court finds that, under either approach, plaintiff  
23 has not established that defendant's decisions as to his employment were based upon any  
24 discriminatory motive.

25  
26  
27  
28

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<sup>14</sup>

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

1           **3. Failure to Promote**

2           In order to establish a *prima facie* case of discrimination, a plaintiff must show that (1)  
3 he belongs to a protected class; (2) he applied for and was qualified for the position he was  
4 denied; (3) he was rejected despite his qualifications; and (4) the employer filled the position  
5 with an employee not of plaintiff's class, or continued to consider other applicants whose  
6 qualifications were comparable to plaintiff's after rejecting plaintiff. See Dominguez-Curry v.  
7 Nevada Transp. Dep't, 424 F.3d 1027, 1037 (9th Cir. 2005) (citing McDonnell Douglas Corp.  
8 v. Green, 411 U.S. 792, 802 (1973)). "If established, the *prima facie* case creates a rebuttable  
9 presumption that the employer unlawfully discriminated against the plaintiff. The burden of  
10 production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its  
11 action." Id. "If the employer meets this burden, the presumption of unlawful discrimination  
12 'simply drops out of the picture.'" Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502,  
13 511, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993)).

14           "The plaintiff then must produce sufficient evidence to raise a genuine issue of material  
15 fact as to whether the employer's proffered nondiscriminatory reason is merely a pretext for  
16 discrimination." Dominguez-Curry, 424 F.3d at 1037 (citing Coleman v. Quaker Oats Co., 232  
17 F.3d 1271, 1282 (9th Cir. 2000)). "The plaintiff may show pretext either (1) by showing that  
18 unlawful discrimination more likely motivated the employer, or (2) by showing that the  
19 employer's proffered explanation is unworthy of credence because it is inconsistent or  
20 otherwise not believable." Id. at 1037 (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217,  
21 1220-22 (9th Cir. 1998)).

22           In the instant case, Gardias essentially claims that he is more qualified than the  
23 applicants chosen for the positions at issue (or is, at least, equally qualified to them), but that he  
24 was denied all of the positions he applied for because he is Polish. He has submitted papers  
25 concerning his education and work experience, as well as affidavits from some of his work  
26 colleagues who opine that plaintiff was qualified for the positions he sought. (Plaintiff's Index  
27 I; Plaintiff's "Valenzuela's Perjury" Index: Burdick Decl., Bersuch Decl., Jansen Decl., Morris  
28 Decl.). As noted above, however, the vast majority of plaintiff's "evidence" consists of his own

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1 letters, memos, and other narratives, replete with hearsay, purporting to describe the events  
2 forming the basis for his complaints. Even assuming that plaintiff could establish a *prima facie*  
3 case of discrimination, defendant offers a legitimate, nondiscriminatory reason for its decisions:  
4 the chosen applicants were more qualified and had more relevant and recent experience than  
5 plaintiff.

6       Nonetheless, “[e]ven if it were uncontested that [the successful applicants’]  
7 qualifications were superior, this would not preclude a finding of discrimination.” Dominguez-  
8 Curry, 424 F.3d at 1040. “An employer may be held liable under Title VII even if it had a  
9 legitimate reason for its employment decision, as long as an illegitimate reason was a  
10 motivating factor in the decision.” Id. In other words, [t]he central focus of the inquiry in a  
11 case such as this is always whether the employer is treating ‘some people less favorably than  
12 others because of their race, color, religion, sex, or national origin.’” Furnco Constr. Corp. v.  
13 Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978) (quoting Teamsters v. United  
14 States, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854, L.Ed.2d 396 (1977)).

15       Here, Gardias’ claims fail because he cannot establish that defendant’s articulated non-  
16 discriminatory reasons for the failure to promote him are pretextual. Nor does this court find  
17 any evidence even suggesting discriminatory animus on the basis of plaintiff’s national origin.  
18 Indeed, although it is not the court’s task to scour the record in search of a genuine issue of  
19 triable fact, see Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996), this court has reviewed  
20 every one of plaintiff’s myriad filings in these five consolidated lawsuits (comprising some  
21 several thousand pages), including his extensive “corrections” to his deposition testimony.  
22 Nothing in the record before this court raises a genuine issue of material fact as to any national  
23 origin discrimination with respect to the jobs he claims should have been his.

24       The only “evidence” plaintiff relies upon in support of his discrimination claim is his  
25 supposition that various persons at the University must have discriminated against him because  
26 they do not happen to be Polish. For example, Gardias says that he learned that Brad Davis  
27 (who apparently was the University’s EEO compliance officer) is a Jew. (Plaintiff’s Index  
28 VII.1). On this basis alone, plaintiff surmises that Davis must have acted with discriminatory

1 intent. Here, Gardias points out that in 2002, he wrote (a) a letter to Congresswoman Zoe  
2 Lofgren, complaining about U.S. support for Israel and (b) a letter to SJSU's president (which  
3 was published in the University's Spartan Daily newspaper), complaining that the newspaper  
4 printed numerous articles about the suffering of Jews, but none about the suffering of Polish  
5 people. (Id.). Without proof that Davis was aware of these missives, Gardias claims that Davis  
6 "falsified" evidence (i.e., failed to send the back page of the Construction Coordinator job  
7 description to the EEOC) and that Davis was motivated to do so because he is a Jew. (Id.).  
8 Similarly, Gardias argues that Tony Valenzuela is Mexican and that all actions taken by  
9 Valenzuela therefore are discriminatory. In deposition, Gardias testified that, on one occasion,  
10 Valenzuela allegedly shook hands with someone named Herman Gonzales (another individual  
11 whom Gardias says is of Mexican descent), but did not greet plaintiff or shake his hand. (Cain-  
12 Simon Decl., Ex. E (Gardias Depo. at 172:2-10)). Gardias has similarly attributed  
13 discriminatory intent to various other individuals because they are (or he believes them to be) of  
14 some heritage other than Polish. (See, e.g., Plaintiff's Opp. at 9, Subsection C).

15 In an effort to prove this race-based theory, plaintiff testified in deposition that there are  
16 fewer white people working in his department now than there were before Valenzuela came to  
17 work for the University. (See Cain-Simon Decl., Ex. E (Gardias Depo. at 589:12-591:10)).  
18 However, Gardias acknowledged that he did not know why certain white employees left SJSU,  
19 and stated, "It's difficult to say discrimination, because you have to prove." (Id. at 591:9-10).  
20 There is no statistical evidence to corroborate that there are, in fact, fewer whites in his  
21 department now, or to even suggest that defendant has a pattern or practice of employing non-  
22 whites over equally qualified whites. In any event, Gardias' speculative assertion is not  
23 probative of his claim that he was treated differently because of his Polish national origin.  
24 Nowhere in plaintiff's twenty years employment at SJSU is there even a suggestion of an anti-  
25 Polish slur or that anyone ever referred to his Polish origin in a disparaging manner. None.  
26 Ever. Nor do his speculative, race-based generalizations give rise to a genuine issue of material  
27 fact as to the existence of any disparate treatment or intent to discriminate on the basis of his  
28

1 national origin. Accordingly, defendant's motion for summary judgment as to plaintiff's  
2 failure-to-promote claims is granted.

3 **4. Harassment**

4 Likewise, this court finds no triable issue as to whether Gardias was subject to a hostile  
5 work environment.

6 Title VII's prohibition against unlawful employment practices "encompasses the  
7 creation of a hostile work environment, which violates Title VII's guarantee of 'the right to  
8 work in an environment free from discriminatory intimidation, ridicule, and insult.'" McGinest,  
9 360 F.3d at 1112 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S. Ct. 2399,  
10 91 L.Ed.2d 49 (1986)). To prevail on a hostile work environment claim, Gardias must show  
11 that his work environment was both subjectively and objectively hostile – that is, he must show  
12 that he perceived his work environment to be hostile, and that a reasonable person in his  
13 position would perceive it to be so. Dominguez-Curry, 424 F.3d at 1034. In determining  
14 whether the alleged conduct created an objectively hostile work environment, the court  
15 evaluates "all the circumstances, 'including the frequency of the discriminatory conduct; its  
16 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and  
17 whether it unreasonably interferes with an employee's work performance.'" Id. at 1034  
18 (quoting Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 270-71, 121 S. Ct. 1508, 149 L.Ed.2d  
19 509 (2001)). "'Simple teasing,' offhand comments, and isolated incidents (unless extremely  
20 serious) will not amount to discriminatory changes in the 'terms and conditions of  
21 employment.'" Id. (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275,  
22 141 L.Ed.2d 662 (1998)).

23 Liberally construed, the record reveals that the instances of alleged harassment are as  
24 follows:

25 • The June 2002 incident (discussed in Section I.A., supra) when Art Heinrich  
26 allegedly yelled at plaintiff to "get out of my office." (Plaintiff's Index VI).  
27 • The "rude manner" in which plaintiff allegedly was treated when he showed up  
28 at the Central Plant for training in 2004 (discussed in Section I.G., supra);

- 1        • In 2004, another employee reportedly told Gardias that, at some point in time,  
2            swastikas had been painted in the basement of the Central Plant during plaintiff's  
3            work shift at the University. (Plaintiff's Index VII.1).<sup>12</sup>
- 4        • During a May 2007 meeting, Gardias says that he asked Adam Bayer for an  
5            organizational chart for the University. Bayer allegedly said "with angry voice:  
6            'Peter, you are a grown man, you should be able to find this information on the  
7            internet on your own.'" (Docket No. 223 at 4).
- 8        • In April 2008, Gardias was speaking with his supervisor, Darin Adams, in  
9            Adams' office. According to plaintiff, Chris Nordby created a "hostile work  
10          environment" when he "came [into the office], without any greeting, and  
11          interrupted our conversation (not for the first time)." (Plaintiff's Index:  
12          "Valenzuela's Perjury").
- 13        • At some point in time, Bayer allegedly called plaintiff's colleagues "stupid."  
14          (*Id.*).
- 15        • At some point in time, someone somewhere made "sexual slurs." (*Id.*)

16          Title VII "does not set forth 'a general civility code for the American workplace.'"

17          Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L.Ed.2d 345  
18          (2006) (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80, 118 S. Ct. 998,  
19          140 L.Ed.2d 201 (1998)); Manatt v. Bank of America, NA, 339 F.3d 792, 798 (9th Cir. 2003)  
20          (quoting Faragher, 524 U.S. at 788). Even viewing the record in the light most favorable to  
21          plaintiff, there is no triable fact issue here. These fleeting and random events are, for the most  
22          part, nonactionable petty slights – and are, in any event, not severe or pervasive enough to  
23          violate Title VII. See, e.g., Vasquez, 349 F.3d at 642-44 (concluding that defendant's few  
24          comments about Hispanics and other alleged harassment, made over the course of more than  
25          one year, did not create a hostile work environment). Defendant's motion for summary  
26          judgment as to plaintiff's harassment/hostile work environment claims is granted.

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27          <sup>12</sup> There is no claim that plaintiff saw the swastikas or any suggestion they were  
28          meant for him. Indeed, the court is at a loss to speculate why plaintiff cites this as  
"evidence" of harassment of him.

1           **5. Retaliation Claims**

2           Gardias broadly asserts that all of defendant's alleged conduct, decisions and actions  
 3 constitute retaliation for the filing of his various complaints.<sup>13</sup> Additionally, he claims that  
 4 defendant engaged in other retaliatory acts as follows:

5           • During a June 13, 2007 meeting, Adam Bayer allegedly "falsely accused"  
 6 plaintiff of putting filters for multiple buildings on a single work order and  
     "degraded [his] communication skills." (Docket No. 223).

7           • On April 19, 2006, Scott Anderson sent plaintiff a memo, alleging that Gardias  
 8 left his work area without permission. During a subsequent meeting with  
     Anderson, Gardias reportedly verified that he was away from his work area  
     during a regularly scheduled break. (Plaintiff's Index VII.1).

9           • On April 24, 2006, Anderson issued another memo to plaintiff when Gardias  
 10 refused to return his phone calls. Gardias claims that he was afraid to speak with  
     Anderson. But he does not deny that he refused to answer Anderson's calls and  
     that he had other employees return Anderson's phone calls for him. (Plaintiff's  
 11 Index VII.1).

12

13           Title VII prohibits an employer "from retaliating against an applicant for employment  
 14 because the applicant has opposed any unlawful employment practice, or has made a charge,  
 15 testified, assisted, or participated in an employment discrimination investigation or  
 16 proceeding." Lyons, 307 F.3d at 1103 (9th Cir. 2002) (quoting Lam v. Univ. of Hawaii, 40  
 17 F.3d 1551, 1558-59 (9th Cir. 1994)); 42 U.S.C. § 2000e-3(a). The same burden-shifting  
 18 analysis that applies to claims for discrimination also apply to retaliation claims under Title VII.  
 19 To make a *prima facie* case of retaliation, a plaintiff "must establish that he undertook a  
 20 protected activity under Title VII, his employer subjected him to an adverse employment action,  
 21 and there is a causal link between those two events." Vasquez, 349 F.3d at 646.

22           Under the circumstances presented, no reasonable trier of fact could conclude that the  
 23 alleged false accusation by Bayer and Anderson's memos are "adverse actions." "The anti-  
 24 retaliation provision protects an individual not from all retaliation, but from retaliation that  
 25 produces an injury or harm." White, 548 U.S. at 67. Thus, an "adverse action," for purposes of  
 26 a Title VII retaliation claim, requires a showing that "a reasonable employee would have found

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27           <sup>13</sup> In deposition, plaintiff testified that he is not asserting any claim as to a  
 28 September 24, 2004 Letter of Instruction issued by John Skyberg. (See Cain-Simon Decl.,  
     Ex. E (Gardias Depo. at 342:14-346:24); Rivera Decl., Ex. A, AGO 558-59).

1 the challenged action materially adverse” – i.e., that the action “well might have ‘dissuaded a  
2 reasonable worker from making or supporting a charge of discrimination.’” White, 548 U.S. at  
3 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). “Context matters,”  
4 and whether a particular challenged action is materially adverse will depend upon the particular  
5 circumstances. Id. at 69. The “standard for judging harm must be objective. . . . It avoids the  
6 uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s  
7 unusual subjective feelings.” Id.

8 Here, Gardias admits to the conduct which formed the basis for the April 24, 2006  
9 memo of concern. As for the alleged false accusations in Anderson’s April 19, 2006 memo and  
10 by Bayer in 2007, the record shows that, at most, Gardias was upset. Although the memos state  
11 that future misconduct might result in corrective or disciplinary action, the facts do not indicate  
12 that Gardias was further disciplined. Nor does the record show that he was demoted, stripped of  
13 work, fired, suspended or reduced in salary or any other benefit as a result of the memos and the  
14 alleged false accusations. Moreover, while Gardias says that the April 19, 2006 memo caused  
15 him to have an anxiety attack, there is nothing in the record (other than his bare assertion) to  
16 suggest that the memo was issued with the “intent . . . to kill plaintiff.” (Docket No. 279 at 2).

17 Even viewing the record as a whole, and assuming that plaintiff could establish a prima  
18 facie case, he has not presented evidence giving rise to a triable issue as to any pretext. In  
19 disposing of plaintiff’s national origin discrimination claim, this court found that defendant’s  
20 reasons for the failure to promote him were legitimate and non-discriminatory. In an apparent  
21 attempt to show that defendant’s explanation is a mere pretext for retaliation, Gardias broadly  
22 suggests that the timing of defendant’s hiring decisions and other alleged acts speak for  
23 themselves. That is, in plaintiff’s view, every hiring decision and other alleged acts must have  
24 been retaliatory because they occurred at some point in time after he filed a charge with the  
25 EEOC or a complaint in court.

26 To begin – and putting aside, for the moment, the untimeliness of some of plaintiff’s  
27 claims – nothing about the termination of the Building Official Assistant position and  
28 defendant’s decision as to the Construction Coordinator position could have been retaliatory

1 because those decisions were made before Gardias filed any of the EEOC charges or lawsuits at  
 2 issue here.<sup>14</sup>

3 In any event, in determining whether plaintiff's evidence passes summary judgment  
 4 muster, the length of time between a protected activity and an adverse employment action is not  
 5 to be considered "without regard to its factual setting." Coszalter v. City of Salem, 320 F.3d  
 6 968, 978 (9th Cir. 2003). Here, the factual setting indicates that, for the past six years or so,  
 7 plaintiff has become a serial complaint-filer – lodging a steady stream of administrative  
 8 charges, followed by federal and state court lawsuits, for every decision, act, or perceived slight  
 9 allegedly based on his national origin. As such, every decision or act complained of in the  
 10 instant consolidated action likely occurred in some temporal proximity to one of Gardias' string  
 11 of filings. But Gardias has presented nothing beyond the bare fact of the timing to rebut what  
 12 otherwise appear to be perfectly legitimate decisions by defendant. See, e.g., Brooks v. City of  
 13 San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (refusing to make a "complaint tantamount to a  
 14 'get out of jail free' card for employees engaged in job misconduct.").<sup>15</sup>

15 Accordingly, defendant's motion as to plaintiff's claims of unlawful retaliation is  
 16 granted.

#### 17 IV. CONCLUSION

18 In essence, Gardias' claims boil down to the simple proposition that he was not hired for  
 19 certain positions ergo defendant must have discriminated against him. But Title VII does not  
 20 command that Gardias obtain positions simply because he believes himself to be qualified (or  
 21 believes that others are unqualified). Rather, Gardias must offer evidence that would support a  
 22 reasonable jury finding that defendant's conduct was based in whole or in part upon some  
 23 unlawful motive. Was there that evidence? There is no potential for liability without it.

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24  
 25<sup>14</sup> The court's electronic docketing system indicates that Gardias previously  
 26 filed a federal complaint against the University in 1996 and another in 1997. Both were  
 27 voluntarily dismissed in 1998. At any rate, there is no causal link between those lawsuits  
 and defendant's decisions, made at least four to five years later, as to the Building Official  
 Assistant position and the Construction Coordinator job.

28<sup>15</sup> This court does not suggest that Gardias was engaging in "misconduct," but  
 the sense of logic expressed by the Brooks court applies here as well.

1 Despite its volume, plaintiff's proffered "evidence" is a veritable potpourri of random  
2 assertions, events, and perceived slights – much of which relies on conjecture ladled with  
3 speculation. In short, Gardias has not linked defendant's decisions and other alleged conduct  
4 with any unlawful motive.

5 **V. ORDER**

6 Based on the foregoing, IT IS ORDERED THAT defendant's motion for summary  
7 judgment is GRANTED. The clerk shall enter judgment and close the file in all consolidated  
8 actions.

9 Dated: March 31, 2009

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12 HOWARD F. LLOYD  
13 UNITED STATES MAGISTRATE JUDGE  
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1 **5:04-cv-4086 Notice has been electronically mailed to:**

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4 **Counsel are responsible for distributing copies of this document to co-counsel who have  
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5  
6 **5:04-cv-4086 Notice mailed to:**

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